

SENATE BILL No. 120

DIGEST OF INTRODUCED BILL

Citations Affected: IC 4-6-2; IC 33-39-10-2; IC 35-38-10; IC 35-44.1-1-6.

Synopsis: Disclosure of exculpatory evidence. Creates the crime of criminal concealment of evidence. Provides that a prosecuting attorney who knowingly or intentionally: (1) withholds; (2) destroys; or (3) fails to disclose the existence of; new, material, or credible evidence creating a reasonable possibility that a convicted defendant did not commit the offense for which the defendant was convicted, commits the crime of criminal concealment of evidence, a Level 6 felony. Creates a good faith exception for the crime of criminal concealment of evidence. Provides that a prosecuting attorney shall: (1) disclose exculpatory evidence to the defendant or defense attorney of record; (2) undertake further investigation to determine whether a defendant is guilty of the offense committed; and (3) remedy an erroneous conviction in certain instances. Requires the attorney general's office to investigate and prosecute allegations of criminal concealment of evidence. Provides the attorney general with certain powers to assist with the investigation and prosecution of criminal concealment of evidence. Allows the attorney general to criminally prosecute claims alleging criminal concealment of evidence. Allows the attorney general to request the assistance of a special prosecutor when prosecuting an allegation of criminal concealment of evidence. Specifies that a prosecuting attorney's existing pretrial discovery obligations regarding exculpatory evidence are not superseded or modified.

Effective: July 1, 2016.

Randolph Lonnie M

January 5, 2016, read first time and referred to Committee on Corrections & Criminal Law.



Second Regular Session 119th General Assembly (2016)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2015 Regular Session of the General Assembly.

SENATE BILL No. 120

A BILL FOR AN ACT to amend the Indiana Code concerning criminal law and procedure.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 4-6-2-1.1, AS AMENDED BY P.L.205-2013,
2 SECTION 54, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
3 JULY 1, 2016]: Sec. 1.1. **(a)** The attorney general has concurrent
4 jurisdiction with the prosecuting attorney in the prosecution of the
5 following:

6 (1) Actions in which a person is accused of committing, while a
7 member of an unlawful assembly as defined in IC 35-45-1-1, a
8 homicide (IC 35-42-1).

9 (2) Actions in which a person is accused of assisting a criminal
10 (IC 35-44.1-2-5), if the person alleged to have been assisted is a
11 person described in subdivision (1).

12 (3) Actions in which a sheriff is accused of any offense that
13 involves a failure to protect the life of a prisoner in the sheriff's
14 custody.

15 (4) Actions in which a violation of IC 2-8.2-4-6 (concerning
16 constitutional convention delegates) has occurred.

17 **(b) Except as provided under IC 33-39-10-2(b)(6), the attorney**



1 **general has exclusive jurisdiction over actions alleging a violation**
 2 **of:**

3 **(1) IC 35-38-10 (postconviction responsibilities of the**
 4 **prosecuting attorney); or**

5 **(2) IC 35-44.1-1-6 (criminal concealment of evidence).**

6 SECTION 2. IC 4-6-2-12, AS ADDED BY P.L.162-2014,
 7 SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
 8 JULY 1, 2016]: Sec. 12. (a) The attorney general has the same
 9 authority as a law enforcement agency (as defined in IC 35-47-15-2) to:

10 (1) access (as defined in IC 35-43-2-3); and

11 (2) maintain;

12 information regarding a violation of IC 35-42-3.5-1 (human trafficking)
 13 **and IC 35-44.1-1-6 (criminal concealment of evidence).**

14 (b) The attorney general may assist with the investigation and
 15 prosecution of an alleged violation of IC 35-42-3.5-1 (human
 16 trafficking). However, the attorney general does not have the power to
 17 arrest or criminally prosecute individuals for a violation of
 18 IC 35-42-3.5-1.

19 **(c) The attorney general has the power to criminally prosecute**
 20 **individuals for a violation of IC 35-44.1-1-6 (criminal concealment**
 21 **of evidence).**

22 SECTION 3. IC 33-39-10-2, AS ADDED BY P.L.57-2014,
 23 SECTION 10, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
 24 JULY 1, 2016]: Sec. 2. (a) A person may be appointed as a special
 25 prosecutor:

26 (1) as provided under this section; or

27 (2) in accordance with IC 4-2-7-7.

28 (b) A circuit court or superior court judge:

29 (1) shall appoint a special prosecutor if:

30 (A) any person, other than a prosecuting attorney or the
 31 prosecuting attorney's deputy, files a verified petition
 32 requesting the appointment of a special prosecutor; and

33 (B) the prosecuting attorney agrees that a special prosecutor is
 34 needed;

35 (2) may appoint a special prosecutor if:

36 (A) a person files a verified petition requesting the
 37 appointment of a special prosecutor; and

38 (B) the court, after:

39 (i) notice is given to the prosecuting attorney; and

40 (ii) an evidentiary hearing is conducted at which the
 41 prosecuting attorney is given an opportunity to be heard;

42 finds by clear and convincing evidence that the appointment



- 1 is necessary to avoid an actual conflict of interest or there is
 2 probable cause to believe that the prosecuting attorney has
 3 committed a crime;
- 4 (3) may appoint a special prosecutor if:
 5 (A) the prosecuting attorney files a petition requesting the
 6 court to appoint a special prosecutor; and
 7 (B) the court finds that the appointment is necessary to avoid
 8 the appearance of impropriety;
- 9 (4) may appoint a special prosecutor if:
 10 (A) an elected public official who is a defendant in a criminal
 11 proceeding files a verified petition requesting a special
 12 prosecutor within ten (10) days after the date of the initial
 13 hearing; and
 14 (B) the court finds that the appointment of a special prosecutor
 15 is in the best interests of justice; ~~and~~
- 16 (5) shall appoint a special prosecutor if:
 17 (A) a previously appointed special prosecutor:
 18 (i) files a motion to withdraw as special prosecutor; or
 19 (ii) has become incapable of continuing to represent the
 20 interests of the state; and
 21 (B) the court finds that the facts that established the basis for
 22 the initial appointment of a special prosecutor still exist; **and**
- 23 **(6) may appoint a special prosecutor if:**
 24 **(A) the attorney general files a verified petition with the**
 25 **court alleging a violation of:**
 26 **(i) IC 35-38-10 (postconviction responsibilities of the**
 27 **prosecuting attorney); or**
 28 **(ii) IC 35-44.1-1-6 (criminal concealment of evidence);**
 29 **and**
 30 **(B) the attorney general requests the assistance of a special**
 31 **prosecutor.**
- 32 The elected prosecuting attorney who serves in the jurisdiction of the
 33 appointing court shall receive notice of all pleadings filed and orders
 34 issued under ~~this~~ subdivision **(5)**.
- 35 (c) A person appointed to serve as a special prosecutor:
 36 (1) must consent to the appointment; and
 37 (2) must be:
 38 (A) the prosecuting attorney or a deputy prosecuting attorney
 39 in a county other than the county in which the person is to
 40 serve as special prosecutor; or
 41 (B) a senior prosecuting attorney as described in section 1 of
 42 this chapter. A senior prosecuting attorney may be appointed



to serve as a special prosecutor in a county in which the senior prosecuting attorney previously served if the court finds that the appointment would not create the appearance of impropriety.

(d) A person appointed to serve as a special prosecutor in a county has the same powers as the prosecuting attorney of the county. However, the appointing judge shall limit the scope of the special prosecutor's duties to include only the investigation or prosecution of a particular case or particular grand jury investigation.

(e) Upon making an appointment under this section, the court shall establish the length of the special prosecutor's term. At least one (1) time every six (6) months throughout the appointed term, a special prosecutor shall file a progress report with the appointing court. A progress report:

- (1) must inform the court of the:
 - (A) status of the investigation; and
 - (B) estimated time for completion of the special prosecutor's duties; and
- (2) may not:
 - (A) include substantive facts or legal issues; or
 - (B) offer preliminary conclusions.

The court may extend the term of appointment upon the request of the special prosecutor or terminate any appointment if the special prosecutor has failed to file reports or a request for an extended term under this subsection.

(f) If the target of an investigation by the special prosecutor is a public servant (as defined in IC 35-31.5-2-261), the court shall order the special prosecutor to file a report of the investigation with the court at the conclusion of the investigation. A report filed under this subsection is a public record under IC 5-14-3.

(g) If a special prosecutor is not regularly employed as a full-time prosecuting attorney or full-time deputy prosecuting attorney, the compensation for the special prosecutor's services:

- (1) shall be paid, as incurred, to the special prosecutor, following an application to the county auditor, from the unappropriated funds of the appointing county; and
- (2) may not exceed:
 - (A) an hourly rate based upon the regular salary of a full-time prosecuting attorney of the appointing circuit;
 - (B) travel expenses and reasonable accommodation expenses actually incurred; and
 - (C) other reasonable expenses actually incurred, including the



costs of investigation, trial and discovery preparation, and other trial expenses.

The amount of compensation a special prosecutor receives for services performed during a calendar day under subdivision (2)(A) may not exceed the amount of compensation a full-time prosecuting attorney would receive in salary for the calendar day.

(h) If the special prosecutor is regularly employed as a full-time prosecuting attorney or deputy prosecuting attorney, the compensation for the special prosecutor's services:

(1) shall be paid out of the appointing county's unappropriated funds to the treasurer of the county in which the special prosecutor regularly serves; and

(2) must include a per diem equal to the regular salary of a full-time prosecuting attorney of the appointing circuit, travel expenses, and reasonable accommodation expenses actually incurred.

SECTION 4. IC 35-38-10 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2016]:

Chapter 10. Postconviction Responsibilities of the Prosecuting Attorney

Sec. 1. In enacting this chapter, the general assembly declares that it is the policy of this state to recognize, preserve, and protect the fundamental right to a fair trial guaranteed to all citizens by the Constitution of the State of Indiana. Therefore, the general assembly declares that it is the policy of this state that the people's fundamental right to a fair trial be treated with the greatest deference by the courts, the state, and the general assembly. The purpose of this chapter is to provide a concrete guarantee to the citizens of Indiana that their fundamental right to a fair trial will be recognized, preserved, and protected.

Sec. 2. When a prosecuting attorney knows of new, material, and credible evidence creating a reasonable possibility that a convicted defendant did not commit the offense for which the defendant was convicted, the prosecuting attorney shall:

(1) promptly disclose the evidence to an appropriate court or authority; and

(2) if the conviction was obtained in the prosecuting attorney's jurisdiction:

(A) promptly disclose the evidence to the defendant or the defendant's attorney of record; and

(B) undertake further investigation or make reasonable



1 efforts to initiate an investigation to determine whether the
 2 defendant has been convicted of an offense that the
 3 defendant did not commit.

4 **Sec. 3. A violation of:**

5 (1) section 2 of this chapter; and
 6 (2) IC 35-44.1-1-6 (criminal concealment of evidence);
 7 shall be investigated and prosecuted by the office of the attorney
 8 general.

9 **Sec. 4. When a prosecuting attorney has probable cause to**
 10 **believe that another prosecuting attorney has violated:**

11 (1) section 2 of this chapter; or
 12 (2) IC 35-44.1-1-6 (criminal concealment of evidence);
 13 the prosecuting attorney shall report the violation to the attorney
 14 general for further investigation and possible prosecution.

15 **Sec. 5. The attorney general has the following powers when**
 16 **investigating or prosecuting a violation of this chapter or**
 17 **IC 35-44.1-1-6:**

18 (1) As part of an investigation, the attorney general may:

19 (A) administer oaths;
 20 (B) examine witnesses under oath;
 21 (C) issue subpoenas and subpoenas duces tecum; and
 22 (D) examine the records, reports, audits, reviews, papers,
 23 books, recommendations, contracts, correspondence, or
 24 any other documents maintained by a prosecuting
 25 attorney's office or a prosecuting attorney accused of
 26 violating this chapter or IC 35-44.1-1-6.

27 (2) The attorney general may apply to a circuit or superior
 28 court for an order holding an individual in contempt of court
 29 if the individual refuses to give sworn testimony under a
 30 subpoena issued by the attorney general or otherwise disobeys
 31 a subpoena or subpoena duces tecum issued by the attorney
 32 general.

33 (3) The attorney general may criminally prosecute a violation
 34 of IC 35-44.1-1-6.

35 (4) The attorney general may petition a court with
 36 jurisdiction for the assistance of a special prosecutor as
 37 described under IC 33-39-10-2(b)(6).

38 **Sec. 6. (a) The attorney general shall prepare a report**
 39 **summarizing the results of every investigation or prosecution**
 40 **alleging a violation of:**

41 (A) section 2 of this chapter; or
 42 (B) IC 35-44.1-1-6 (criminal concealment of evidence).



1 (b) A report created under this section is a public record under
2 IC 5-14-3.

3 **Sec. 7. This chapter does not supersede or modify a prosecuting**
4 **attorney's pretrial discovery obligations regarding exculpatory**
5 **evidence under case law or the Rules of Professional Conduct of**
6 **the Indiana supreme court.**

7 SECTION 5.IC 35-44.1-1-6 IS ADDED TO THE INDIANA CODE
8 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
9 1, 2016]: **Sec. 6. (a) Except as provided in subsection (b), a**
10 **prosecuting attorney who knowingly or intentionally:**

11 **(1) withholds;**

12 **(2) destroys; or**

13 **(3) fails to disclose the existence of;**

14 **new, material, and credible evidence creating a reasonable**
15 **possibility that a defendant did not commit the offense for which**
16 **the defendant was convicted, commits criminal concealment of**
17 **evidence, a Level 6 felony.**

18 **(b) A prosecuting attorney's good faith judgment that evidence**
19 **does not meet the description provided in subsection (a), even if**
20 **erroneous, does not constitute a violation of this section.**

21 **(c) This section does not supersede or modify a prosecuting**
22 **attorney's existing pretrial discovery obligations regarding**
23 **exculpatory evidence under case law or the Rules of Professional**
24 **Conduct of the Indiana Supreme Court.**

